08-806 DEC 18 2008

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No._____

In the

Supreme Court of the United States

DAVID AND KAY SIEVERDING

Petitioners,

v.

FAEGRE & BENSON, LLP

Respondent.

On Writ Of Certiorari
To The United States Courts Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS

Mr. and Mrs. David and Kay Sieverding
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Petitioners, pro se

QUESTIONS PRESENTED

1.) Must U.S. Judges and Courts permit self-represented litigants the same procedure and procedural rights as litigants represented by counsel?

2.) By procurement of a "No Pro Se" order, Faegre & Benson LLP avoided discovery obligations and prevented Sieverdings' testimony. Does that require a default sanction?

LIST OF PARTIES

David and Kay Sieverding were the plaintiffs and appellants in the courts below. Faegre & Benson LLP was the defendant and appellee in the courts below. The Sieverdings believe that Mutual Insurance Limited of Bermuda and possibly other insurers insured their action against the listed defendant, Faegre & Benson LLP.

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IN THE SUPREME COURT
OF THE UNITED STATES
PETITION FOR WRITS OF CERTIORARI

Petitioners respectfully pray that writs of certiorari issue to review the judgment below.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

Neither the district court ruling nor the Court of Appeals ruling is published.

JURISDICTION

The Eight Circuit entered judgment on July 20, 2008 and denied timely petitions for rehearing and rehearing en banc on September 19, 2008. A copy of the order denying rehearing appears at 4a.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED:

U.S. Code Title 18 § 1512 Witness Intimidation Act

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to

appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [1] supervised release,,[1] parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.

U.S. Code Title 28 § 1654 *Appearance Personally or By Council*

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

U.S. Code Titie 28 § 2283 *Stay of State Court Proceedings.*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF CASE

I. The Constitutional and regulatory framework formerly protected the Right of Self-Representation but it is now under threat.

New case law removes the rights of self-represented litigants to have the same procedure in court as represented litigants. In 2007, 10% of all federal civil non-prisoner case filings were pro se. That may increase. It is very tempting for civil defendants to claim No Pro Se orders.

II. There was previous related litigation in a different federal court producing a No Pro Se order directed towards possible new complaints and proceedings.

A. In a 2002 District of Colorado case before Judge Edward Nottingham, 02-1950, Sieverdings pled that they were injured by local government permit fraud and alleged extortion, perjury, conspiracy against rights, and false government certificate. There were no stipulations of fact and no evidentiary hearings were held or allowed.

B. Faegre & Benson LLP participated in a *Conspiracy Against Rights*. The defendant avoided discovery in related actions thru extortionist threats and unlawful imprisonment in 2005, 2006 and 2007.

In Judge Nottingham's court, no sanction order that complied with Rule 11 c. (6) *Requirements for an Order* was issued and there was no injunction bond, no motion for an injunction, no injunction hearing, and no document complying with Rule 65 (d) *Contents and Scope of Every Injunction and Restraining Order*.

Without a pretrial order allowed by Rule 16 (c)(2), and without an injunction motion or hearing, Judge Nottingham wrote: "Plaintiffs are hereby enjoined and prohibited from commencing litigation in this or any other court based on the series of transactions described in this case, unless they are represented by counsel."

Faegre & Benson LLP did not object to the No Pro Se order.

The Sieverdings filed related actions. Instead of presenting a defense under Rule 12 (b) *How to Present Defenses*, Faegre & Benson LLP made threats against the Sieverdings' physical liberty. Faegre & Benson LLP assumed the role of prosecutor defying the Supreme Court's order in *Young v. United States ex rel. Vuitton* 107 S. Ct. 2124, 481 U.S. 787 (1987).

Following Faegre & Benson LLP's requests, Judge Nottingham threatened the Sieverdings and jailed Mrs. Sieverding three times totaling five months. The procedure did not comply with the Rules of Criminal Procedure. No government prosecutor was requested. No offense recognized in law was stated.

III. In 08-01064, Faegre & Benson LLP requested, without citing a basis in statute, that the judge dismiss their complaint solely because the Sieverdings represented themselves.

The Sieverdings filed a complaint, 08-01064,

against Faegre & Benson LLP in the District of Minnesota. They invoked U.S.C. 42 § 1985 *Conspiracy to interfere with civil rights* (2) and claimed assault, abuse of process, malicious prosecution, and interference with Access to Court.

After filing a document labeled "answer", Faegre & Benson LLP requested the judge dismiss the Sieverdings' complaint against itself on the basis that other judges had ordered Sieverdings not to represent themselves and no lawyer had entered an appearance for them. Rule 16 (c)(2), *Matters for Consideration* and Rule 12(b) *How to Present Defenses* do not allow for orders or dismissal on that basis. The District Court dismissed the Sieverdings' complaint anyway and stated no other basis for dismissal. This dismissal defeated Faegre & Benson LLP's disclosure and discovery obligations. This dismissal also procured the absence of the Sieverdings. This procedure treated the Sieverdings differently than represented litigants on the basis of their self-represented status. It was an abuse of judicial discretion.

By asking the court to process a No Pro Se order, Faegre & Benson LLP asked the court to ignore the limits on their powers to dismiss that are defined in Rule 16 (c)(2) *Matters for Consideration*. At any pretrial conference, the court may consider and take appropriate action on the following matters". The plain language of the law prohibits the court from taking action on any matters that do not follow. In the "a" to "p" categories, there is no authorization for No Pro Se orders. The "other"

category is limited to subjects that result in a just determination.

Rule 17 (b) (1) mandates that the *capacity to sue* of a person who is not acting in a representative capacity be determined "by the law of the individual's domicile". The Sieverdings live in Wisconsin and Wisconsin recognizes a Constitutional Right to Self-Representation (Article 1 § 21 (2)). No exception to Wisconsin law was discussed.

None of the Rule 26 initial disclosures were made. In fact, in their answer Faegre & Benson LLP denied that their partner wrote what he uploaded through ECF and said what he said in front of a court reporter. These are self-authenticating court documents that are admissible under Rule 902 *Self Authentication (1) Domestic Public Documents Under Seal*. The success of their No Pro Se request resulted in Faegre & Benson LLP not having to explain why they denied the validity of federal court records.

Although the Sieverdings timely objected and filed two motions for reconsideration, the No Pro Se order and dismissal were ratified and upheld without discovery and without citation of a statute or rule.

At no time did Faegre & Benson LLP make the insurance documents available for photocopying as required by Rule 26 (a)(1) (iv).

IV. In the proceedings below, court adjudication services were denied without discovery or

statement of reasons in law.

A. District of Minnesota denied all services on basis of Sieverdings' pro se status.

The district court ordered a dismissal without a statute or a law. Court services including mediation are denied to Sieverdings unless they hire a lawyer at their own expense before filing.

The stated reason for the judgment dismissing the claims without remedy was:

> "The above orders require Plaintiffs to obtain counsel before filing a lawsuit, not to seek appointed counsel after such lawsuit is filed. Moreover, there is no right to counsel in a civil matter, and the Court is without the power to appoint counsel in this situation. The Court finds that the instant lawsuit is in violation of the orders of Judge Tunheim and of the Colorado courts. Therefore, pursuant to Rule 41, the Court dismisses this matter without prejudice. Should Plaintiffs wish to press their claims, they must secure the assistance of an attorney prior to filing any lawsuit relating in any way to the events described in the above orders."

B. 8th Circuit summarily dismissed the Sieverdings' paid and timely petition.

The Sieverdings filed their notice of appeal and brief within 30 days and promptly mailed $450. Faegre & Benson LLP filed a motion to dismiss the appeal due to Sieverdings' pro se status. Two hours later, the 8th Circuit dismissed without stating reasons.

C. Rehearing was denied.

No reason was given.

D. Sieverdings' motion for a reason for summary dismissal was denied.

Since an appellant summary dismissal was used even though the conditions for using one did not apply, there is nothing to publish. The Sieverdings can only speculate on the appellate court's reasoning.

SUMMARY OF ARGUMENT

The Right of Self-representation is a statutory, common-law, fundamental and constitutional right and, therefore, many theories, laws, and rules support The Right. Since self-representation is a right, pro se litigants must be permitted the same procedural due process as represented litigants.

As Officers of the Court, Faegre & Benson LLP had a duty to conform their defense to the rules and could not request nor benefit from a deviation from the Rules of Civil Procedure. Faegre & Benson LLP procured the absence of the Sieverdings and their evidence. Therefore, under Rule 804(b)(6) Faegre & Benson LLP cannot on remand enter evidence opposing the Sieverdings' complaint and pleadings. Faegre &

Benson LLP requested and obtained abuse of judicial discretion through the vehicle of illegal No Pro Se orders to dismiss for the purpose of avoiding discovery. Therefore, under Rule 37 b (2)(A) (vi) their default must be entered on remand. Faegre & Benson LLP cannot be allowed delayed discovery and trial because they illegally caused the delay and extra expense by claiming illegal No Pro Se orders and, as recognized by the judicial maxim, "No one can take advantage of his own wrong".

The Supreme Court should accept the Sieverdings petition for Writs of Certiorari, because the 8th Circuit departed from the accepted and usual course of judicial proceedings. The Supreme Court should accept the Sieverdings petition for Writs of Certiorari, because the 8th Circuit ruled contrary to the Colorado Supreme Court. The Supreme Court should accept the Sieverdings petition for Writs of Certiorari, because the 8th Circuit and district court ruled contrary to 2007 Supreme Court dicta representing an abuse of discretion.

The 8th Circuit's summary dismissal allows judges to dismiss on grounds not allowed by Rule 12(b) or Rule 16 (c)(2). This violated the Equal Protection Laws. The Sieverdings' petition is important because it affects the rights of all non-prisoner pro se litigants and that group currently accounts for 10% of all federal civil court filings.

ARGUMENT

I. A No Pro Se civil litigation order is unconstitutional.

A. The *Equal Protection* Doctrine permits self-

represented litigants the same procedure and procedural rights as litigants represented by counsel.

42 U.S.C.§ 1981 *Equal rights under the law* prohibits impairment of rights to sue, be parties, and give evidence by nongovernmental discrimination. Congress was clear that as officers of the court, attorneys share responsibility with the judge to whom the case is assigned to make sure that civil litigation is resolved fairly and without undue cost or delay."

In 1987, the Colorado Supreme Court "followed the analytical mode developed by the United States Supreme Court in construing the Equal Protection Clause" to apply the Equal Protection Clause of the *Fourteenth Amendment* to pro se litigants:

> "Because the chief judge's directive lacks a rational basis for distinguishing between pro se litigants and litigants represented by attorneys, we conclude that it violates equal protection of the laws"
>
> "Equal protection of the laws requires that the government treat similarly situated persons in a similar manner. A distinction between classes or groups of people, whether created by a statute or rule, must have some

relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 111, 15 L. Ed. 2d 620, 86 S. Ct. 760 (1966). When governmental action is subjected to an equal protection challenge, the level of judicial scrutiny varies with the type of classification employed and the nature of the right affected."

"The Colorado Supreme Court followed the analytical mode developed by the United States Supreme Court in construing the Equal Protection Clause of the *Fourteenth Amendment*. When the classification creates a suspect class, such as one based on race or national origin, or interferes with the exercise of a fundamental right, such as the right of free speech or religion, a standard of strict judicial scrutiny must be applied in resolving an equal protection challenge. The government in such a case must establish that the statutory classification is necessarily related to a compelling governmental interest. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct.

1848 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *Heninger v. Charnes*, 200 Colo. 194, 613 P.2d 884 (1980); *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603 (1972). Certain classifications, such as illegitimacy and gender, have been analyzed under an intermediate standard of scrutiny. Under this standard, the government is required to demonstrate a substantial relationship between the classification and an important governmental objective. E.g., *Caban v. Mohammed*, 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760 (1979); *Orr v. Orr*, 440 U.S. 268, 59 L. Ed. 2d 306, 99 S. Ct. 1102 (1979); *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976); *R.McG. v. J.W.*, 200 Colo. 345, 615 P.2d 666 (1980)."

"In the absence of a suspect class, a fundamental right, or a classification triggering an intermediate standard of scrutiny, a rational basis standard of review is applicable. While equal protection of the laws does not demand that a statute or rule necessarily applies equally to all persons, it does require, under rational basis analysis, that a governmental classification which

singles out a group of persons for disparate treatment be rationally founded on differences that are real and not illusory and that such classification be reasonably related to a legitimate state interest. See, e.g., *San Antonio Independent School District*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 ; *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 16 L. Ed.=2 02d 577, 86 S. Ct. 1497 (1966); *Branson v. City and County of Denver*, 707 P.2d 338 (Colo. 1985); *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982); *Smith v. Charnes*, 649 P.2d 1089 (Colo. 1982); *Petrafeck v. Industrial Commission*, 191 Colo. 566, 554 P.2d 1097 (1976). There is a presumption of constitutionality attaching to a classification analyzed under the rational basis standard, with the burden being on the challenging party to establish unconstitutionality beyond a reasonable doubt. E.g. *Branson*, 707 P.2d 338; *Dawson by and through McKelvey v. P.E.R.A.*, 664 P.2d 702 (Colo. 1983)."

"When the rational basis standard has not been met, the classification must be stricken even if the invalidation results in an additional

administrative inconvenience to the governmental body. Administrative convenience, by itself, does not constitute a valid basis for the imposition of disparate treatment upon persons who, with respect to the activity in question, are basically in the same position as others who are not singled out for different treatment. E.g., *Rinaldi*, 384 U.S. 305, 16 L. Ed. 2d 577, 86 S. Ct. 1497 ; *Baxstrom*, 383 U.S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760 ; Ca*rter v. Firemen's Pension Fund*, 634 P.2d 410 (Colo. 1981); see also *Petrafeck*, 191 Colo. 566, 554 P.2d 1097."...[discussing]

"The distinction created by the chief judge's directive appears to be a distinction not between lawyers and non-lawyers but between pro se litigants and litigants represented by lawyers. The classifying feature of the chief judge's directive, therefore, is the pro se litigant's failure to retain an attorney in connection with a claim for which a statutory filing fee is required. The constitutional flaw in the directive is the lack of a rational foundation....measures, however, cannot arbitrarily discriminate against the pro se litigant who, as much as the litigant represented by counsel, has the right to seek judicial

> relief for the redress of legal wrongs in accordance with procedures applicable to all who use the courts." *Tassian v. People*, 731 P.2d 672 (Colo. 1987)

An equal protection "applies equally to judicial action" See *Shelly v. Kraemer*, 334 U.S. 1 (1948), therefore, the *Fifth Amendment* procedural due process guaranties apply in litigation. "In the case of litigation recovery, the income-generating asset is the cause of action derived from the plaintiff's legal injury." *Commissioner of Internal Revenue v. Banks* 543 U.S. 426 (2005).

The Sieverdings have a right to equal protection of the laws. Faegre & Benson LLP arranged for Mrs. Sieverding to be incarcerated three times without the required procedural due process for a U.S. citizen to be incarcerated by her government. Because it led to the dismissal of cases in Minnesota, Judge Nottingham's 2004 No Pro Se order removed the Sieverdings' rights to defend themselves on the same basis as anyone else in court against fraudulent warrants, Witness Intimidation, Witness Retaliation, Conspiracy Against Rights, Extortion, Schemes to Defraud, and Crimes of Violence alleged in that complaint. These acts occurred after Judge Nottingham's 2004 No Pro Se order. The 2008 No Pro Se order by the District of Minnesota was unconstitutional because it

denied the Sieverdings equal protection of the laws.

In 42 U.S.C. § 1981 *Equal rights under the law* Congress chose to specifically restrict nongovernmental parties from interfering in citizens' rights "to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property."

B. A No Pro Se litigation order interferes with the *First Amendment Right to Petition* both the Judicial and Executive branches of government.

The Sieverdings' pleadings alleged Faegre & Benson LLP participated in a Conspiracy to Interfere with Civil Rights. They supported that with facts in the form of quotations by Faegre partners in court transcripts, documents Faegre & Benson LLP filed, and documents from state insurance regulators. The issuance and enforcement of orders against pro se litigation interfered with Sieverdings' ability to obtain a decision on the merits. If there is no Supreme Court hearing this petition, the No Pro Se order potentially interferes with the Sieverdings' *First Amendment* right to petition the Supreme Court for a Writ of Certiorari regarding a decision on the merits since there will probably never be a decision on the merits. Therefore the issuance and enforcement of No Pro Se orders are unconstitutional under

the *First Amendment*.

The Sieverdings' complaint also alleged that the Sieverdings were victims of violent and financial crimes perpetuated by Faegre & Benson LLP and co-conspirators. The Sieverdings have a First Amendment Right to use discovery to gather evidence of criminal acts against them by Faegre & Benson LLP. They planned to turn this evidence over to the Executive Branch with a request for criminal prosecution. The issuance and enforcement of No Pro Se orders interfere with the Sieverdings' rights to petition the executive branch. Therefore they are unconstitutional under the *First Amendment*.

The Sieverdings believe that insurance companies in the case may have committed state and federal crimes. They planned to use discovery to obtain evidence that they intended to turn over to state insurance regulators and/or the Executive Branch. The issuance and enforcement of No Pro Se orders interfere with the monitoring of insurance companies. Therefore they are unconstitutional under the *First Amendment*.

Any first amendment prohibition requires "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate". *See NAACP v. Button*, 83 S. Ct. 328, 371 U.S. 415 (U.S. 01/14/1963)

The No Pro Se order did not advance any

state interest.

> "The right to petition is one of the most precious liberties safeguarded by the Bill of Rights...Like successful suits, unsuccessful suits allow the 'public airing of disputed facts,' Bill Johnson's, supra, at 743 (quoting Balmer, *Sham Litigation and the Antitrust Law*, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force." *National Labor Relations Board*, 122 S. Ct. 2390, 153 L.Ed.2d 499 (2002)

C. Rule 52, Rule 65 and Rule 16 (c)(2) prohibit courts from issuing orders against civil self-representation.

Federal courts are not authorized to issue free-form edicts, pronouncements, rulings, decisions, or orders. Any judgment or interlocutory order requires a reason in law. An injunction requires a reason in law.

Rule 16(c)(2) restricts the subject of pretrial orders to categories "a" to "p". Category "p"

requires a just consideration. A dismissal without a stated law is not a just consideration and a Rule 16 (c)(2) p order cannot substitute for a judgment. None of the categories allow No Pro Se orders.

D. Pro se complaints are a subset of "all cases" to which Article III § 2 JUDICIAL POWER extends. Rule 1 requires a speedy and inexpensive determination of every action.

Many of the drafters of the Constitution were lawyers including Samuel Adams and Thomas Jefferson. If the framers meant, "all cases handled by lawyers" instead of "all cases", Article III § 2 would have reflected that. Even though many of the framers had reason to believe that their professional and personal finances might benefit from restricting pro se representation, they knew it was not the will of the people.

The word "determination" dates from the 14th Century and means "a: a judicial decision settling and ending a controversy b: the resolving of a question by argument or reasoning". If there is no determination, then in Congress it was acknowledged that 'controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another'.

When Congress passed 42 U.S.C. § 1981 *Equal rights under the law*, they represented

"all the people". Lawyers experience law in the best possible way because of their skill and knowledge but Congress knew of the frustration of ordinary citizens and instructed the Courts that all people must have remedies for their wrongs:

> "As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Cong. Globe, 42d Cong.*, 1st Sess., App. 68 (1871) *Briscoe v. LaHue, 460 U.S. 325 (1983) Justice Blackmun dissenting.*

In 1993, Congress repeated the message of the affirmative duty of the courts. "The purpose of this revision, adding the words "and administered" to the second sentence [in Rule 1], is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay." *Notes of Congressional Advisory Committee on 1993 amendments* Rule 1

In their oaths of office, federal judges agree

to "administer justice with respect to persons and do equal right to the poor and the rich." Since, as the District of Minnesota points out, there is no sstatutory right to government paid legal assistance in civil matters, a No Pro Se order or the enforcement of such discriminates against those not rich. The ABA reports that in 2007 big law firm hourly billing rates averaged $348. That more than twenty times the median hourly wage of U.S. workers.

The Supreme Court has been clear that judges cannot boycott pro se cases:

> "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema* 534 U.S. 506 (2002)

E. The U.S. Code Title 28 § 1654, Wisconsin Constitution Article 1 § 21(b), and Wisconsin Courts recognize an absolute right of self–representation. Their Wisconsin domicile determines Sieverdings' rights to appear in a non-representative capacity under Rule 17 b (1).

28 U. S. C. § 1654 states,

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel."

In 2007, the right of self-representation was affirmed by the Supreme Court dicta in *Winkelman v. Parma City School District*:

> "there is no question that a party may represent his or her own interests in federal court without the aid of counsel."

The official Wisconsin annotated constitution includes:

> "Every person has an absolute right to appear pro se. *Hlavinka v. Blunt, Ellis & Loewi, Inc.* 174 Wis. 2d 381, N.W.2d (Ct. App. 1993)

and recognizes the Right:

> "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." Wisconsin Constitution Article 1 § 21 (2)

Since the Sieverdings make their domicile in Wisconsin, Rule 17 (b) (1) makes the Wisconsin constitution determinate for them in federal courts.

F. Self-representation is a common law right.

The Right of Self-Representation of "every man" and "both men" is recognized in the Bible. "Absalom sa'd moreover, Oh that I were made judge in the land, that every man which

hath any suit or cause might come unto me, and I would do him justice!" *Second Book of Samuel* 15:4 "Then both the men, between whom the controversy is, shall stand before the Lord, before the priests and the judges, which shall be in those days." *Deuteronomy* 19:17

In the 13th Century, lawyers so monopolized the courts in London that the King was forced to decree that, except for a few special causes, litigants were entitled to plead their own cases without lawyers.

The Pennsylvania Frame of Government (1682)as quoted in *Faretta v. California*, 422 U.S. 806 (1975), provided:

> "That in all courts, all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves".

The colonies of Massachusetts, Virginia, Connecticut, and the Carolinas prohibited paying lawyers to appear in court. *See Faretta.*

The people have a common law right to participate in government through petitioning whiles self-represented. William Penn and William Marbury exercised their Self-Representation Right and by doing so defended the rights of the people.

G. Self-Representation is a Fundamental or Natural Right protected by Article IV § 2 The PRIVILEGES AND IMMUNITIES clause.

Founders including Thomas Paine believed that self-representation in court is a basic or natural right.

> "Among the particular privileges and immunities which are clearly to be deemed fundamental, the court in that case specifies the right 'to institute and maintain actions of any kind in the courts of the state'... in *Ward v. Maryland*, 12 Wall 418-430, 20 L. Ed. 449-452, the court after referring to *Corfield v. Coryell*...stated that the right 'to maintain actions in the courts of the state' was fundamental...The final judgment in this case therefore denies a fundamental right inherent in citizenship, and protected by 2 of Article 4 of the Constitution." *Chambers v. Baltimore & Ohio R.R.* Co. 207 U.S. 142 (1907)

> "The word 'privileges' must be confined to those privileges which are fundamental; and includes the right to institute and maintain actions of any kind in the courts of the State....The right is not 'merely procedural'... *Chambers v. Baltimore & Ohio R.R. Co.* 207 U.S. 142

> ....leaves it undisputed that the right to maintain actions in the courts is one of the fundamental privileges guaranteed and protected by the Constitution." *Canadian Northern Railway Company v. Eggen* 40 S. Ct. 402, 252 U.S. 553 (1920).

H. 28 U.S.C. § 2283 *Anti-Injunction Act* applies in federal courts and prohibits the issuing of No Pro Se injunctions.

> "Congress has made it clear beyond cavil that the prohibition of the Anti-Injunction Act is not to be whittled away by judicial improvisation." *Amalgamated Clothing Workers v. Richmond Brothers*, 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600.1 1955.

Federal Rules of Evidence Rule 302 requires that the effect of a presumption respecting a fact that is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law. State law recognizes the federal Anti Injunction Act.

I. The Right of Self-Representation is necessary to maintain plaintiff- lawyer agency relationships.

> "The relationship between client and attorney, regardless of the variations in particular compensation agreements or the amount of skill

> and effort the attorney contributes, is a quintessential principal-agent relationship...The plaintiff retains dominion over this asset throughout the litigation." *Commissioner of Internal Revenue v. Banks* 543 U.S. 426 (2005).

The plaintiff can fire the lawyer and represent herself.

J. Because a new court has independent jurisdiction, the doctrine of collateral estoppel requires discovery and prohibits reliance on the court-produced doctrine of mutuality even when the litigant has no lawyer.

> "Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard... plaintiff must be permitted to demonstrate, if he can, that he did not have "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time." Eisel v Columbia Packing Co., 181 F.Supp. 298, 301 (Mass. 1960)..... Res judicata and collateral estoppel are affirmative defenses that must be pleaded. Fed. Rule Civ. Proc. 8 (c)".

> *Blonder-Tongue Laboratories Inc v. University of Illinois Foundation et al.* 1434, 402 U.S. 313, 28 L. Ed. 2d 788, 1971.SCT.41650 (1971)

A No Pro Se order recognizing a No Pro Se order in a previous court, as the District of Minnesota did, allows collateral estoppel as a defense to be invoked as a motion but collateral estoppel can only be invoked as a Rule 8(c) defense followed by Rules 26-37 discovery. After the previous No Pro Se orders additional acts by the defendant resulted in additional claims.

K. Some ABA policy makers quoted on the ABA website acknowledge the Right of Self-Representation.

> "The courts do not exist for lawyers, but for the public. It is, in fact, this public that this pro se litigant increasingly exemplifies."

The ABA has supported a movement to offer legal services on a basis that require the individual to engage in some pro se litigation.

> "Unbundling, the practice of offering discrete services from a menu of offerings, is changing the face of the legal profession today. Given minor modifications, any firm can start unbundling their law practice and offer this new consumer-oriented

> approach to legal service delivery to their clients."
>
> "The Handbook is a practical guide to providing legal services in a way that permits clients, who otherwise could not afford or would not choose to hire a lawyer, to obtain critical legal representation for discrete and important tasks in the course of resolving disputes."

In order to purchase the discrete or unbundled legal services the ABA and other bar associations suggest as a new legal services product, the Sieverdings must be able to represent themselves in the other portions of a legal process.

II. Faegre & Benson LLP's possible defensive tactics were limited by the rules.

A. *Rule 16 (c)(2)* limits matters for consideration in pretrial conferences. No category allows No Pro Se orders.

Rule 16(c)(2)(p) requires "*just determination*".

> "In civil matters conferred on the district courts ....for the protection of all persons in the United States in their civil rights, and for their vindication [jurisdiction] shall be exercised and enforced in conformity with the laws of the United States... 'give the rule the effect which the

> plain meaning of its language and the legislative history require.... if the rule is to be amended...it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress . . . . It is not for us as enforcers of the rule to amend it under the guise of construing it".... "civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause". *Green v. Block Laundry Machine Co.* 490 U.S. 504 (1989) (05/22/89)

B. Rule 12 (b) limits motions to dismiss to seven categories and No Pro Se is not one. A No Pro Se request under local rules cannot toll the defendants' obligations under Rules 26-37.

The 2000 amendments to Rule 26 removed the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from - or limit or expand - the disclosure provided under the national rule.

C. All people are entitled to give evidence.

Preliminary questions concerning the qualification of a person to be a witness are determined by the court, subject to the

provisions of subdivision Rules of Evidence Rule 104(b) "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition". The validity of a No Pro Se order requires an evidentiary proceeding.

D. Officers of the Court are required to comply with the Constitution and statutes and a No Pro Se request does not.

Defendants and their counsel are required to adjudicate within the bounds of the law. The Notes of Advisory Committee on Rules were clear in 1993, when they specified that lawyers, as Officers of the Court, share responsibility with the assigned judge to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. The defense counsel were bound by their oath "I will conduct myself uprightly and according to law and I will support the Constitution of the United States."

E. Engaging in misleading conduct with intent to "influence, delay, or prevent the testimony of any person in an official proceeding" is criminal under the *Witness Protection Act*.

Title 18 § 1512. *Tampering with a witness, victim, or an informant* (b) made misleading conduct to prevent testimony in a civil proceeding criminal. There is no exception in

the statute for lawyers or for actions within a civil lawsuit. It is a crime punishable by fine or imprisonment to hinder, delay or prevent communication to a law enforcement officer or judge.

III. Any decision must be compatible with the judicial maxim "No one can take advantage of his own wrong". (see Antonin Scalia and Bryan A. Garner, *Making Your Case, the Art of Persuading Judges p.30)*

A. A No Pro Se request procures absence of plaintiffs through an abuse of judicial discretion and triggers 804 (b) (6) sanctions.

By filing a complaint and cover sheet claiming self-representation, Sieverdings proclaimed their availability as witnesses. Thus *Rules of Evidence Rule 804 (b) Hearsay Exceptions Declarant Unavailable (6) Forfeiture* by *Wrongdoing* is invoked because Faegre & Benson LLP "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" by obtaining a lawless order.

The words "*available as a witness*" means full availability. The Sieverdings were entitled to have a case management meeting, court managed mediation hearing, and other hearings as needed and they were entitled to not only answer questions when asked, but to ask questions. The Sieverdings alleged U.S.C. Title 42 § 1985 *Conspiracy to interfere with*

civil rights (2) *Obstruction of Justice*, Title 42 § 1985(2). The *Witness Intimidation Act*,Title 18 § 1512, protects the Sieverdings.

Since none of the seven allowed categories of reasons listed in Rule 12 (b) were invoked, and no order against the Sieverdings based on a Rule was invoked, Sieverdings were entitled to have initial disclosures before the case was terminated and then they were entitled to discovery.

Faegre & Benson LLP also filed a request that the appellate court enforce discrimination in court against the class of people defined by their state of not being lawyers and/or not having a lawyer thru summary dismissal of their appeal.

However, ARTICLE XI: *Miscellaneous Rules Rule 1101. Applicability of Rules* (b) Proceedings generally states that the privilege of appearing as witnesses applies at all stages of all actions, cases, and proceedings. Thus, there was a second Rule 804(b)(6) violation at the Court of Appeals.

The 1997 Notes of the Congressional Advisory Commisssion on the Rules added Rule 804(b)(6) because Congress recognized the need for a prophalatic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself". The wrongdoing need not consist of a criminal act so no criminal conviction is needed to invoke

Rule 804(b)(6) default. The rule applies to al parties including the government so involvement by the government in procuring the absence of pro se litigants does not relieve the defendants and their counsel of responsibility.

Thus, *Rules of Evidence Rule 804 (b) Hearsay Exceptions Declarant Unavailable (6) Forfeiture by Wrongdoing* is invoked, mandating that Faegre & Benson LLP forfeit its right to enter evidence, because Faegre & Benson LLP "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" by obtaining a lawless order.

This interpretation of 804(b)(6) is consistent with the Court's decision in *Giles v. California* 544 U.S. 2008 because it relies on the second common law doctrine permitting the introduction of Sieverdings' statements because they were kept away from court by the procurement of the No Pro Se order by Faegre & Benson LLP.

B. Faegre & Benson LLP avoided Rule 26 (a) and (f) and thereby triggered Rule 37 b (2)(A)(vi) sanction of default.

Rule 16 (c)(2) categories do not include No Pro Se orders but Faegre requested one anyway.

Only motions to dismiss complying with Rule 12 (b), toll Rule 26 (a) and 26 (f). Faegre & Benson LLP's request for a No Pro Se order

was not one of the seven and only seven motion categories allowed by Rule 12 (b) *How to Present Defenses*. There is no Rule 12 (b) category called "other". The request for a statute-less order of dismissal is exempted from Rule 11(e) because it is a subcategory of "disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37."

Faegre & Benson LLP filed an answer, but denied its obligations under Rule 26. It cited no order based on a rule against the Sieverdings. Congress was clear when it amended Rule 26 in 2000 that there were to be no local rules restricting disclosure.

Federal Rules of Civil Procedure Rule 37 b (2) (A)(vi) *Sanctions in the District* where the Action is Pending rendering a default judgment against the disobedient party requires that Faegre & Benson LLP be found in default because it violated orders of the Supreme Court.

The plain language of Rule 37 b (2) (A) is clear:

> "If a party...— fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following...

(vi) rendering a default judgment against the disobedient party."

C. The *Witnesss Intimidation Act* requires airing of facts related to alleged witness intimidation.

Public policy requires that for the protection of the people any complaint related to an act of witnesss intimidation be aired in a court of law.

IV. Supreme Court standards for the writ of certiorari apply:

A. A No Pro Se order is an egregious departure from the accepted and usual course of judicial proceedings.

Federal Court is not for businesses only. In fact, individuals are invited to federal courts when they have claims for U.S.C. Title 42 § 1983 *Civil action for deprivation of rights* and/or U.S.C. Title 42 § 1985 *Conspiracy to interfere with civil rights* (2) *Obstruction of Justice*.

> "The 1871 Congress intended § 1 to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, id. at 376 (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts." *Patsy v.*

Board of Regents of State of Florida, 457 U.S. 496 (1982)

> "One of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone--the humblest citizen, the indigent, the convicted felon, the illegal alien." *NAACP v. Meese*, 615. F. Supp. 200 (D.D.C) (1985)

The district court instructed that the only way the Sieverdings could appear and present evidence is through counsel purchased at their own expense. The result is the delay or absence of the Sieverdings testimony at an official proceeding and that is conduct Congress defined as criminal in the Witness Intimidation Act.

B. No Pro Se orders conflict with the *Tasssian v. People* Equal Protection Analysis by the Colorado Supreme Court.

The Colorado Supreme Court was clear that because litigation is a fundamental right any restrictions on pro se litigation must use the rational basis standard. The District of Minnesota's No Pro Se order did not recognize any basis other than the doctrine of mutuality. That is prohibited by the doctrine of collateral estoppel.

Sanctions are required by Rules 804 (b)(6) and 37 b (2) (A) (vi) because discovery cannot

be eluded by a No Pro Se order.

C. A United States 8th Circuit Court of Appeals ruled contrary to 2007 Supreme Court dicta, cited by the Sieverdings, in a way that is important because it affects at least 10% of all federal civil non- prisoner complaints. (see Antonin Scalia and Bryan A. Garner, *Making Your Case, the Art of Persuading Judges,* p.53)

The 8th Circuit by omitting their reasons decided the Sieverdings' question in a way that conflicted with the Supreme Court's dicta, (which the Sieverdings quoted to them), in *Winkelman v. Parma City School District* 127 S. Ct. 1994 (2007): "there is no question that a party may represent his or her own interests in federal court without the aid of counsel." That 2007 Supreme Court dicta is consistent with Supreme Court decisions and the U.S. code.

Pro ses in 2007 filed 10% of federal civil actions. All self-represented litigants are at risk if they lose their rights to file Rule 60b(3) motions or civil petitions alleging related facts. All natural persons currently paying for attorney services are at risk if they both lose their financial assets and their self-representation rights. Society is at risk if insurance and criminal information is suppressed by avoidance of discovery through No Pro Se orders.

Access to court is the cornerstone of democracy and the institution of democracy itself is threatened by No Pro Se orders.

CONCLUSION

The decision of the Court of Appeals upholding a No Pro Se order should be reversed. The complaint should be remanded for an order compelling default sanctions under Rule 804(c)(6) and/or Rule 37 b (2)(A)(vi) default sanctions.

Respectfully submitted,

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